Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCC-16–06 OF 2019
ONG CHEE KWAN J
11 DECEMBER 2019

Contract — Claim for repayment of non-refundable earnest deposit — Respondents filed action against appellant — Sessions court held that respondents had proven their case against appellant and appellant appealed — Whether there was variation/waiver — Whether there was misrepresentation by appellant — Whether appellant entitled to keep non-refundable earnest deposit

This was an appeal from the decision of the sessions court judge after full trial. The respondents sought for a repayment of a non-refundable earnest deposit of RM600,000 paid to the appellant under an agreement involving the purchase of shares of a company known as Delicious Moments Sdn Bhd ('DMSB'). The respondents claimed that the appellant had failed to fulfil a condition precedent and had breached his warranty under the agreement which rendered the agreement null and void. The appellant was a shareholder and a director of DMSB which owned a coffee chain business. The appellant was the registered and beneficial owner of 682,500 shares in DMSB. Some time in 2016, the respondents were on an acquisition mode and were keen to acquire, inter alia, a coffee chain business which was missing from their portfolios and which the respondents could develop and was scalable. Discussions with the appellant for the aforesaid purpose took place in August 2016 and the appellant sent an unaudited outlet profit and loss of DMSB to the respondents ('the outlet P&L'). The first respondent and the appellant thereafter entered into a sale of shares agreement ('the agreement') wherein the first respondent would purchase and the appellant would sell 507,500 of his shares in DMSB representing 80% of the shares in DMSB subject to the terms and conditions of the agreement. Subsequently, a supplemental agreement ('the supplemental agreement') was executed where the cash consideration was expressly provided to be a non-refundable earnest deposit. The first respondent made five payments in the total sum of RM600,000 to and received by the appellant. On 16 January 2018, the first respondent terminated the agreement vide a letter. The respondents filed a suit against the appellant for the refund of the RM600,000 deposit paid by reason of the termination due to the non-compliance of the condition precedent particularly cl 5.1.1(a) and breach of the warranties on the financial information of DMSB. The respondents claimed that the appellant had misrepresented DMSB's financial position in the outlet P&L. The sessions court found that the respondents had proven

their case on a balance of probabilities against the appellant and hence this appeal. A

Held, allowing the appeal with costs:

(1) The learned sessions court judge had failed to appreciate that a body of evidence was in fact let in during the trial without any objection by the respondent. The plea of a variation to the cl 5.1.1(a) did not represent a radical departure from the appellant's pleadings being merely a 'variation, modification or development of what has been alleged in the pleading in question'. Accordingly, the session court had erred in law (see paras 16 & 20–21). B C

(2) There was ample oral evidence and also indirect documentary evidence that supported the appellant's case on the variation/waiver. The execution of the second extension on 31 July 2017 was not inconsistent with a variation of the cl 5.1.1(a) as contended by the appellant. The parties could validly vary their agreement orally notwithstanding the existence of cl 12.8 of the agreement. The respondents were estopped from insisting on compliance with the anti-oral variation clause. It would be unjust and detrimental to the appellant if the respondents were permitted to rely on cl 12.8 of the agreement. Accordingly, the learned session court judge was wrong when she held that the appellant was prohibited from raising the existence of a variation to the cl 5.1.1(a) (see paras 22, 29, 41–42 & 46–47). D E

(3) The respondents' claim of financial misrepresentation against the appellant was in truth an afterthought, contrived to support their claim for a breach of warranty under the agreement. The termination of the agreement by the first respondent was made as part of the decision taken to cut losses. It was never based on any financial misrepresentation or non-compliance of any condition precedents. As the respondents' BOD was never presented with the profit figure and the BOD had not relied on the same and was not induced thereby into entering the agreement with the appellant, the respondents had not established on the balance of probabilities their case for misrepresentation. There was no breach of any warranties by the appellant in the form of a financial misrepresentation as claimed by the respondents. Given that there was no breach, the termination of the agreement by the respondents under the letter was unlawful (see paras 72, 76, 78–79 & 82). F G H

(4) The RM600,000 was a security to the appellant as the respondents wanted operational control immediately and he had to give up operational control of DMSB as well. It was trite that a party was entitled to keep the deposit paid as security if there was a failure to fulfil the contract by the purchaser (see paras 83–84). I

[Bahasa Malaysia summary

Ini adalah rayuan daripada keputusan hakim mahkamah sesyen selepas perbicaraan penuh. Responden meminta pembayaran balik deposit cengkeram yang tidak boleh dikembalikan sebanyak RM600,000 yang dibayar kepada perayu di bawah perjanjian yang melibatkan pembelian saham syarikat yang dikenali sebagai Delicious Moments Sdn Bhd ('DMSB'). Responden mendakwa bahawa perayu telah gagal untuk memenuhi prasyarat dan telah melanggar jaminan di bawah perjanjian yang menjadikan perjanjian itu menjadi batal dan tidak sah. Perayu adalah pemegang saham dan pengarah DMSB yang memiliki perniagaan rantaian kopi. Perayu adalah pemilik berdaftar dan berkepentingan 682,500 saham dalam DMSB. Pada tahun 2016, responden berada dalam proses pengambilalihan dan berminat untuk memperoleh, antara lain, perniagaan rantaian kopi yang tiada daripada portfolio mereka dan yang responden dapat bangunkan dan kembangkan. Perbincangan dengan perayu untuk tujuan yang tersebut berlaku pada bulan Ogos 2016 dan perayu menghantar *outlet profit and loss* yang belum diaudit kepada responden ('outlet P&L'). Responden pertama dan perayu selepas itu menandatangani perjanjian penjualan saham ('perjanjian') dimana responden pertama akan membeli dan perayu akan menjual 507,500 sahamnya di DMSB yang mewakili 80% saham dalam DMSB tertakluk kepada terma dan syarat perjanjian. Selepas itu, perjanjian tambahan ('perjanjian tambahan') dilaksanakan di mana balasan tunai dinyatakan untuk menjadi deposit cengkeram yang tidak boleh dikembalikan. Responden pertama membuat lima pembayaran dalam jumlah wang sebanyak RM600,000 dan diterima oleh perayu. Pada 16 Januari 2018, responden pertama menamatkan perjanjian melalui surat. Responden memfailkan saman terhadap perayu untuk bayaran balik deposit RM600,000 yang dibayar oleh sebab penamatan akibat ketidakpatuhan prasyarat terutama klausa 5.1.1(a) dan pelanggaran terhadap jaminan mengenai maklumat kewangan DMSB. Responden mendakwa perayu telah memalsukan kedudukan kewangan DMSB di *outlet P&L*. Mahkamah sesyen mendapati bahawa responden telah membuktikan kes mereka di atas imbangan kebarangkalian terhadap perayu dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim mahkamah sesyen yang bijaksana telah gagal menghargai bahawa suatu badan keterangan sebenarnya dibiarkan semasa perbicaraan tanpa sebarang bantahan oleh responden. Permohonan pengubahan kepada klausa 5.1.1(a) tidak mewakili perbezaan radikal daripada pliding perayu yang hanya sekadar 'variasi, pengubahsuaian atau perkembangan apa yang dikatakan dalam pliding yang dipersoalkan'. Sehubungan itu, mahkamah sesyen telah terkhilaf dalam undang-undang (lihat perenggan 16 & 20–21).

(2) Terdapat keterangan lisan yang mencukupi dan juga keterangan dokumentari tidak langsung yang menyokong kes perayu mengenai variasi/pengecualian. Pelaksanaan pelanjutan kedua pada 31 Julai 2017 tidak bertentangan dengan variasi klausa 5.1.1(a) sebagaimana yang dikatakan oleh perayu. Pihak-pihak boleh dengan sah mengubah persetujuan mereka secara lisan walaupun kewujudan klausa 12.8 perjanjian itu. Responden telah diestop daripada menuntut kepatuhan terhadap klausa anti-lisan. Adalah tidak adil dan merugikan perayu jika responden dibenarkan untuk bergantung pada klausa 12.8 perjanjian itu. Oleh itu, hakim mahkamah sesyen yang bijaksana salah apabila beliau berpendapat bahawa perayu dilarang untuk menimbulkan kewujudan variasi kepada klausa 5.1.1(a) (lihat perenggan 22, 29, 41–42 & 46–47).

(3) Tuntutan responden berkenaan pemalsuan kewangan terhadap perayu adalah sebenarnya suatu yang difikirkan kemudian, yang dibuat untuk menyokong tuntutan mereka untuk pelanggaran jaminan di bawah perjanjian itu. Penamatan perjanjian oleh responden pertama dibuat sebagai sebahagian daripada keputusan yang diambil untuk mengurangkan kerugian. Ia tidak pernah berasaskan apa-apa pemalsuan kewangan atau ketidakpatuhan terhadap mana-mana prasyarat. Oleh kerana BOD responden tidak pernah dibentangkan dengan angka keuntungan dan BOD tidak bergantung pada perkara yang sama dan tidak mendorongnya memasuki perjanjian dengan perayu, responden tidak membuktikan di atas kebarangkalian kes mereka untuk pemalsuan. Tidak ada pelanggaran apa-apa jaminan oleh perayu dalam bentuk pemalsuan kewangan seperti yang didakwa oleh responden. Memandangkan tidak ada pelanggaran, penamatan perjanjian oleh responden melalui surat adalah menyalahi undang-undang (lihat perenggan 72, 76, 78–79 & 82).

(4) RM600,000 adalah jaminan kepada perayu kerana responden mahukan kawalan operasi serta-merta dan dia terpaksa melepaskan kawalan operasi DMSB juga. Adalah mantap bahawa pihak berhak untuk menyimpan deposit tersebut sebagai jaminan sekiranya terdapat kegagalan memenuhi kontrak oleh pembeli (lihat perenggan 83–84).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Globe Motors Inc and others v TRW Lucas Varity Electric Steering Ltd and another [2017] 1 All ER (Comm) 601, CA (refd)

Goh Eng Hwa v M/S Laksamana Realty Sdn Bhd [2004] 3 MLJ 97; [2004] 1 CLJ 274, CA (refd)

HTJ Development Sdn Bhd v Teoh Chin Kee & Anor [2018] MLJU 1753; [2018] 1 LNS 1849, HC (refd)
I-Way Ltd v World Online Telecom UK Ltd (formerly Localtel Ltd) [2002] All ER (D) 114 (Mar); [2002] EWCA Civ 413, CA (refd)
Karuppiah v Petaling Garden Co Sdn Bhd [1972] 1 MLJ 173, FC (refd)
Liebe v Molloy [1906] HCA 67, HC (refd)
MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] 4 All ER 21; [2018] UKSC 24, SC (refd)
Macronet Sdn Bhd v RHB Bank Sdn Bhd [2002] 3 MLJ 11, HC (refd)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585, CA (refd)
Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor [2013] 8 MLJ 713; [2015] 2 CLJ 530, HC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460, CA (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Virulite LLC v Virulite Distribution Ltd and another [2014] EWHC 366 (QB), QBD (refd)

Legislation referred to

Evidence Act 1959 s 92

HR Dipendra (Noor Azanida Abidin with him) (Koh Dipendra Jeremiah Law) for the appellant.
Lourdes Abishegam (Kelly Koh with him) (Zahir Jeya & Zainal) for the first and second respondents.

Ong Chee Kwan J:

[1] This is an appeal from the decision of the sessions court judge after full trial. The legal issues raised in this case involve the court's duty to consider evidence that was put in without objection from counsel on matter that was not pleaded, the validity or effectiveness of an anti-oral variation clause and elements required to establish an actionable misrepresentation.

BACKGROUND FACTS

[2] The respondents sought for a repayment of a non-refundable earnest deposit of RM600,000 paid to the appellant under an agreement involving the purchase of shares of a company known as Delicious Moments Sdn Bhd ('DMSB'). The respondents claimed that the appellant had failed to fulfil a condition precedent and had breached his warranty under the agreement which rendered the agreement null and void.

[3] At the material times, the appellant was a shareholder and a director of DMSB which owned a coffee chain business called The Morning After ('TMA'). The appellant was the registered and beneficial owner of 682,500 shares in DMSB.

[4] The respondents were and are involved in food and beverage business. The second respondent wholly owned the first respondent. Some time in 2016, the respondents were on an acquisition mode and were keen to acquire, inter alia, a coffee chain business which was missing from their portfolios and which the respondents could develop and is scalable.

[5] Discussions with the appellant for the aforesaid purpose took place in August 2016 and on 22 September 2016, the appellant sent an unaudited outlet profit and loss of DMSB to the respondents ('the outlet P&L'). The outlet P&L showed the figures for the total sales, costs of goods sold, gross profit, operating expenses and net profit for the period from January–August 2016.

[6] The first respondent and the appellant thereafter entered into a sale of shares agreement dated 1 November 2016 ('the agreement') wherein the first respondent (the purchaser) would purchase and the appellant (the vendor) would sell 507,500 of his shares in DMSB representing 80% of the shares in DMSB subject to the terms and conditions of the agreement. The purchase consideration would comprise a combination of cash payment and share swap. Valuation of the appellant's shares was based on two times the EBITDA value of DMSB.

[7] Subsequently, a supplemental agreement dated 8 November 2016 ('supplemental agreement') was executed where the cash consideration was expressly provided to be a non-refundable earnest deposit.

[8] The first respondent made five payments in the total sum of RM600,000 to and received by the defendant. This is not disputed.

[9] The period for the appellant to fulfil the condition precedents was extended on 31 January 2017 for six months to 31 July 2017 and subsequently extended for another three months from 31 July–31 October 2017. This is also not disputed.

[10] On 16 January 2018, the first respondent terminated the agreement vide a letter dated 16 January 2018. the reasons for the termination were stated as follows:

A (a) the appellant had failed to fulfil the condition precedent particularly cl 5.1.1(a) which requires the assignment of intellectual property rights of DMSB including trademarks to the first respondent by 31 October 2017;

B (b) the outlet P&L of DMSB sent by the appellant to the respondents contained inaccurate or misleading information about the profitability of DMSB which the respondent discovered after the respondents had in October 2017 received the audited financial statement and auditors' report of DMSB for the period ended 31 March 2017; and

C (c) the inaccurate financial information and non-disclosure of material facts constitutes a serious and fundamental breach of warranties under the agreement.

D **[11]** The respondents filed a suit against the appellant for the refund of the RM600,000 deposit paid by reason of the termination due to the non-compliance of the said condition precedent and breach of the warranties on the financial information of DMSB. The respondents claimed that the appellant had misrepresented DMSB's financial position in the outlet P&L
E furnished by the appellant.

[12] On 20 June 2019, the sessions court found that the respondents had proven their case on a balance of probabilities against the appellant and granted the following reliefs:

F (a) declaration that the sale of shares agreement dated 1 November 2016 and supplemental agreement dated 8 November 2016 are null and void;

(b) tudgment sum of RM600,000 to the respondents;

G (c) interest at the rate of 5%pa from 24 January 2018 until the judgment sum is satisfied; and

(d) costs of RM20,000 to the respondents.

[13] After reading the appeal records and hearing lengthy oral submissions
H from counsel, my judgment on the appeal is set out below.

THE COURT'S REASONINGS AND DECISION

[14] In the appellant's defence, the appellant claimed that all condition
I precedents including cl 5.1.1(a) had been fulfilled and complied with. However, at the trial, the appellant had sought to show that the condition precedent under cl 5.1.1(a) had been varied by the parties.

[15] The learned sessions court judge found this to be a departure from the

appellant's pleaded case and rejected this part of the appellant's submission on the ground that the '... contention that cl 5.1.1(a) was varied was never pleaded, and defendant had failed to bring any documentary evidence to show that any of the terms and conditions in the agreement is waived'.

[16] In so holding, the learned sessions court judge had, with respect, failed to appreciate that a body of evidence was in fact let in during the trial without any objection by the respondent to establish that during the months of March and April 2017, at a C-Suite Meeting, a decision was taken by the respondents to waive the requirement under cl 5.1.1(a) of the agreement.

[17] There are at least three decisions of our apex court that have held that in such circumstances, it is the bounden duty of the trial court to consider the evidence and the submissions and to come to a decision on the issue. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, the Federal Court at p 342 ruled that:

> Thirdly, where there in no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and came to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded.

[18] Similarly, in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, the Federal Court reiterated the same principle and held that:

> No objection was taken to evidence being led on behalf of the intervener/purchaser and the case was argued both in the High Court and on appeal to the Court of Appeal, as though the intervenor/purchaser was a co-defendant which had filed a pleading and it was on this basis that the case was heard and determined.

[19] And in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 at pp 191–192, the Supreme Court said:

> We next deal with the fact that such evidence was not objected to timeously as being inadmissible on account of its being at variance with the pleadings.
>
> Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent, please see *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488; similarly with technical rules of procedure. Therefore, when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of evidence in the instant appeal. In these circumstances, the party facing such

A evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that B stage.

Such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by the Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 C at p 278: 'Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise'. There is, however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.

D The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau* & *Anor v Lau Piang Ngong, and John G Stein* E *& Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.

[20] The plea of a variation to the cl 5.1.1(a) does not represent a radical departure from the appellant's pleadings being merely a 'variation, modification or development of what has been alleged in the pleading in F question'.

[21] Accordingly, the learned sessions court had erred in law when she dismissed the appellant's submission on the point of variation purely on the ground that the appellant had not pleaded the same in his defence. This error G justifies intervention from this court hearing the appeal of the judgment.

[22] On the finding as to whether there was in fact a variation/waiver, although there was no direct documentary evidence adduced by the appellant to show that the cl 5.1.1(a) had been varied/waived, I find that there was ample H oral evidence and also indirect documentary evidence that support the appellant's case on the variation/waiver.

[23] in particular, the learned sessions court judge had not directed her I attention at all to the following oral evidence:

(a) the testimony by 'DW1' who was at the material time the second. The respondent's Chief Executive Officer ('CEO'). DW1 was directly involved in the negotiations and discussions with the appellant on the agreement. He was not called by the respondents to give evidence even

though he had personal knowledge of the events from the initial meetings with the appellant in August 2016 till the termination of the agreement in January 2018 (albeit in his capacity as the group strategic advisor during the final quarter of 2016 and early 2017). Instead, it was the appellant who had subpoenaed DW1 to court to give evidence. From the notes of proceedings, there is nothing to suggest that DW1's evidence was in any way undermined during cross-examination. On the cl 5.1.1(a), this was what he said:

> DW-1: Initially the trademark is supposed to be assigned to Rhombus Food & Lifetsyle but based on legal advice, we decided to transfer the trademark to DMSB, since DMSB would be 80% owned subsidiary of Rhombus Food & Lifestyle.
>
> HRD: Who made that decision?
>
> DW-1: The decision was made during one of the C-Suite meeting, due to risk management purpose.
>
> HRD: When was this?
>
> DW-1: If I am not mistaken, this took place somewhere around March or Apri12017.
>
> HRD: Was this decision communicated to the Defendant?
>
> DW-1: Yes.
>
> HRD: So, based on the testimony that you have just given, so long as the trademark is assigned to DMSB, the conditions precedents will be fulfilled?
>
> DW-1: Yes, you are right.

DW1 further explained the reason why he had signed the letter of extension on 31 July 2017 for the appellant to comply with cl 5.1.1(a) of the condition precedents. He said:

> LA: But don't you agree, it is simple, you were the CEO, you know. If you said that was agreed in the meeting, but in July, at page 120, you have actually signed an extension for them to comply. So, don't you think it contradicts?
>
> DW-1: I don't think it contradicts because the formal registration of the trademark, ok, is still in process. That is my understanding when I signed this.

DW1 also stated that the decision made at the C-Suite Meeting to vary cl 5.1.1(a) was not an informal discussion but taken at a formal meeting of the C-Suite which comprised of all the heads of divisions, the group CEO and most directors of the second respondent.

It is also significant that during a meeting at DW-1's house in November 2017, when the appellant was told that the respondents were no longer interested in purchasing his shares, it was based on the

underperformance of the DMSB's business with no mention made to any financial misrepresentation or breach of condition precedents. This was what he said during cross-examination:

> LA: Yes. So Darren was aware in November that is that the Plaintiff was no longer interested in purchasing his shares and he's told to take the company away, correct?
>
> DW-1: That was the indication.
>
> LA: That was the indication, isn't it. So that means at that point of time it's clear that Plaintiff is not going to buy over the company.
>
> DW- 1: It wasn't clear.
>
> LA: It wasn't clear right? Then you say you wanted to assist Darren under performance.
>
> DW-1: No, not me. The Management Team.

(b) the testimony of 'DW2' who was at the material time the CEO of the first respondent and a member of the respondents' C-Suite Committee. He has direct knowledge of the meetings held in March/April 2017 when the decision to waive the condition in cl 5.1.1(a) was made. He was also not called by the respondents to give evidence and was subpoenaed by the appellant. He confirmed that during one of the C-Suite Meetings, a decision was indeed made to house The Morning After trademarks with the brand owner company, which is this case would be DMSB. He further confirmed that at one of the C-Suite Meetings, DW1 and PW3, being the second respondent's CEO and Chief Corporate Director respectively, had mentioned that all the condition precedents under the agreement had been met. Again, his testimony was not undermined during cross-examination. This was what he said:

> HRD: So now Mr Andre, you earlier said that you were aware that the trademarks are to be kept within the related ... what was the word you used? Related —
>
> DW-2: Brand owner.
>
> HRD: Related brand owner which is Delicious Moments. So, how did you, did anyone tell you or how did you come to that opinion?
>
> DW-2: Ok during our C-Suite meetings, our monthly C-Suite meetings, it was then agreed that all the trademarks of the brands should be kept back at the brand owner company which are the subsidiaries. For example like when my company was acquired, my brands were acquired, Rama V and Fa-Ying, those brands were trademark under the company Gema Naga 2 Sdn Bhd which is a subsidiary of Rhombus Food & Lifestlye. Likewise also recently, we had a new restaurant brand that is called Thai Hou Sek as well, we also have a trademark that brand. That brand was also trademark under the subsidiary

Gema Naga Sdn Bhd which had another subsidiary call RFL Restaurant 2 Sdn Bhd. A

HRD: Earlier you said that all the condition precedents have been met, correct?

DW-2: I was made aware of that. B

HRD: Who told you that? Who made you aware of this?

DW-2: It was mentioned in C-Suite Meetings.

(c) the oral testimony of 'DW3', who was the then solicitors for the respondents instructed to ensure that The Morning After trademarks were assigned to the first respondent as stipulated under cl 5.1.1(a) of the agreement. he gave evidence that after the agreement was signed, the instruction to him from the respondents was to have the trademarks assigned to DMSB instead of the first respondent. In fact, he said that he was never instructed by the respondent to assign the trademarks to the first respondent. Again, the appellant had to subpoena him to give evidence. He testified as follows: C D

HRD: Were you in any way involved in the assigning of trademark? E

DW-3: Yes, I did. I have instructed a trademark agent by the name of Messrs Foong Cheng Leong to register, to assign the trademark from Ng Sau Foong Delicious Moments Sdn Bhd.

HRD: So, it appears to me that you, your, you acted contrary to 5.1.1(a). Is that correct? F

DW-3: I don't agree.

HRD: Why?

DW-3: On paper, yes but I don't agree because instructions given to me were not as per 5.1.1(a), subsequent to signing of the agreement. G

DW-3's testimony was not undermined during his cross-examination; and

(d) there is also the testimony by 'DW4' who is the appellant himself. This was what he said: H

DW-4: After the agreement was signed, in about March of, March or April in the C-Suite meeting that was attended by all the senior management of the company, which includes Mr Tham, Mr Vincent, Mr Clement and Mr Andre, all of which are, they comprise of the Board of Rhombus Food & Lifestyle. It was a unanimous decision that all the trademarks will have to stay within the operating company. So, the same was actually communicated to Mr Lai Chee Hoe and at that time, Mr Lai Chee Hoe was the then counsel for the, for First and Second Plaintiff, rather the Chief Legal Officer ... I

DW4 also testified that the extension of the condition period for a further three months on 31 July 2017 from 31 July–31 October 2017 was 'to allow time for the trademark agent to complete the registration for the trademark' to DMSB.

[24] These oral testimonies by DW1, DW2, DW3 and DW4 above are consistent with each other and are also corroborated by the following evidence:

(a) an email dated 23 June 2017 ('D15') from one Loh Kar Yite (an assistant to PW3) to the C-Suite members attaching a compilation of the then current status of all the Rhombus Group's trademarks. Whilst it is true that the compilation itself is not documentary evidence of the variation, nevertheless the compilation does show that the respondents had housed each of the trademarks at their respective brand owner companies. This is consistent with the testimony given by DW1, DW2, DW3 and DW4. Although learned counsel for the respondent had sought to explain that the other trademarks are housed in their respective brand owner companies only because their agreements had expressly provided to be so, there is in fact no evidence to support this and in any event, even if this were the case, it does not at all mean that the parties cannot agree to vary the cl 5.1.1(a) to be consistent with the position with regards to the other trademarks;

(b) it is also significant that there is a conspicuous absence of any correspondence at all relating to the non-compliance of cl 5.1.1(a) at the material times. From the evidence, it is clear that the parties were conscious of the need to comply with cl 5.1.1(a) as the agreement were extended twice to meet the condition. Yet, it is strange that there was absolutely no mention of this 'non-compliance' at all throughout the second extension period. Even DW3, the solicitors who was instructed to ensure compliance of the cl 5.1.1(a) did not raise any issues with the parties of any 'non-compliance'. The only explanation for this deafening silence must be that the parties had treated the assignment of The Morning After trademarks to DMSB as due compliance of cl 5.1.1(a);

(c) there is also a WhatsApp message dated 11 October 2017 where PW3, when asked about the acquisition of the 80% shares of DMSB, had replied that the acquisition would proceed once the audited accounts is out as 'there is no other conditions need to be fulfilled'. This shows that by mid-October 2017, the parties were only looking at the first respondent's obligation to complete the purchase. PW3's attempt to explain away his WhatsApp message as a 'very casual conversation' where he did not know with certainty of the situation with the trademarks is difficult to accept given that he was at all material times the Chief Corporate Officer of the second respondent who was responsible for ensuring the implementation of the agreement. The fact that PW3 did

not even raise this 'non-compliance' with the appellant after the WhatsApp message, in my mind, makes his attempts to explain away his WhatsApp message as disingenuous; and

(d) then there is the meeting at DW1's House in November 2017. There was also no mention at all at this meeting on the non-compliance of cl 5.1.1(a) even when the appellant was told of the respondents' intention to divest The Morning After brand. The discussion was more about DMSB's underperformance and how this could be improved.

[25] The only evidence that the respondents are relying to rebut the existence of the agreement to vary cl 5.1.1(a) is the extension of the agreement that was executed on 31 July 2017 where the parties agree to extend the condition period for a further three months from 31 July–31 October 2017. Paragraph 2 of the letter states:

> Pursuant to clause 5.1.2, due to the non-fulfilment of Condition Precedent 5.1.1(a), we hereby write to record that both the Vendor and the Purchaser have agreed to extend the Condition Period to 3 months from 31.7.2017.

[26] According to learned counsel for the respondents, since the assignment of the trademarks to DMSB was already done in July 2017, there would be no reason for the parties to agree to the extension of the condition period on 31 July 2017 if as contended by the appellant, the parties had agreed to vary the cl 5.1.1(a) sometime in March/April 2017. The assignment of the trademarks on 17 July 2017 would have met the condition precedent.

[27] The reason for the extension notwithstanding the assignment on 17 July 2017, according to learned counsel for the respondents was because the cl 5.1.1(a) had not been met. There was a further requirement to have The Morning After trademarks assigned from DMSB to the first espondent. This contention was accepted by the learned sessions court judge.

[28] With respect, it is not correct to say that the assignment of The Morning After trademark to DMSB was done on 17 July 2017 as contended. If one were to look at the letter dated 18 July 2017 from Fang Cheng Leong of Messrs FCL & Co, what was done on 17 July 2017 was only the filing of the application for the registration of the mark. Hence, as at 31 July 2017 it was not clear that the assignment of the trademarks to DMSB would be completed. This was the reason for the extension of the condition period from 31 March–31 October 2017. DW4 confirmed this in his evidence. This was what he said:

> Because the assignment ... because of the variation, it took a little bit of time to have the assignment done as well as the registration of the trademark. There were two extensions that were signed. One of the ... one on 31 January 2017 for six months,

A and subsequently another one was signed for three months to allow time for the trademark agent to complete the registration for trademark.

[29] Accordingly, the execution of the second extension on 31 July 2017 is not inconsistent with a variation of the cl 5.1.1(a) as contended by the B appellant.

[30] The respondents also referred to cl 12.8 of the agreement to oppose the variation. The clause states:

C 12.8 Amendments & Additions

No amendment, variation, revocation, cancellation, substitution or waiver of or addition or supplemental to, any of the provisions of this agreement shall be effective unless it is in writing and signed by both of the parties.

D

[31] Armed with the aforesaid clause, learned counsel for the respondents submitted that any variation that was decided upon by the C-Suite Committee shall not be effective as the same was not in writing and signed by both the parties.

E

[32] Clause 12.8 was not raised in the pleadings and neither did the respondents put the clause to any of the appellants' witnesses. Nevertheless, the clause was referred to in the closing submission of the Respondents.

F **[33]** Clause 12.8 is what is known as an anti-oral variation clause quite often found in contracts. There has been a number of judicial decisions in other jurisdictions on the effectiveness of such clauses and whether the parties may in fact be prevented from producing evidence that is inconsistent with such a clause.

G

[34] Prior to 2018, the UK position regarding anti-oral variation clauses as determined in *I-Way Ltd v World Online Telecom UK Ltd (formerly Localtel Ltd)* [2002] All ER (D) 114 (Mar); [2002] EWCA Civ 413, *Virulite LLC v Virulite Distribution Ltd and another* [2014] EWHC 366 (QB), *Globe Motors Inc and* H *others v TRW Lucas Varity Electric Steering Ltd and another* [2017] 1 All ER (Comm) 601 at p 627 was that there can be oral variation taking effect notwithstanding the existence of such a clause. This is also the position in Australia as considered by the Australia High Court in *Liebe v Molloy* [1906] HCA 67. *Chitty on Contracts* (32nd Ed, 2015) para 22-045, note 196 also I opined that 'the better view would appear to be that it is possible for parties to waive compliance' with such a clause.

[35] Most recently the UK Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] 4 All ER 21; [2018] UKSC 24 has

opted to take a clean break from the approach taken by most common law jurisdictions holding that the law should give effect to a contractual provision requiring formalities to be observed for a variation. Lord Sumption, delivering the leading judgment opined his grounds in this manner:

> [7] At common law there are no formal requirements for the validity of a simple contract. The only exception was the rule that a corporation could bind itself only under seal, and what remained of that rule was abolished by the Corporate Bodies Contracts Act 1960. The other exceptions are all statutory, and none of them applies to the variation in issue here. The reasons which are almost invariably given for treating No Oral Modification clauses as ineffective are (i) that a variation of an existing contract is itself a contract; (ii) that precisely because the common law imposes no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form; and (iii) they must be taken to have intended to do this by the mere act of agreeing a variation informally when the principal agreement required writing. All of these points were made by Cardozo J in a well-known passage from his judgment in the New York Court of Appeals in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380, 387–388:
>
> > Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which contradicts it' (*Westchester F Ins Co v Earle* 33 Mich 143, 153). What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again ...
>
> [11] The starting point is that the effect of the rule applied by the Court of Appeal in the present case is to override the parties intentions. They cannot validly bind themselves as to the manner in which future changes in their legal relations are to be achieved, however clearly they express their intention to do so. In the Court of Appeal, Kitchin LJ observed that the most powerful consideration in favour of this view is 'party autonomy': para 34. I think that this is a fallacy. Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement.
>
> [12] The advantages of the common law's flexibility about formal validity are that it enables agreements to be made quickly, informally and without the intervention of lawyers or legally drafted documents. Nevertheless, No Oral Modification clauses like cl 7.6 are very commonly included in written agreements. This suggests that the common law's flexibility has been found a mixed blessing by businessmen and is not always welcome. There are at least three reasons for including such clauses. The first is that it prevents attempts to undermine written agreements by informal means, a

possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them. These are all legitimate commercial reasons for agreeing a clause like cl 7.6. I make these points because the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy. Yet there is no mischief in No Oral Modification clauses, nor do they frustrate or contravene any policy of the law.

[15] If, as I conclude, there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation, then what of the theory that parties who agree an oral variation in spite of a No Oral Modification clause must have intended to dispense with the clause? This does not seem to me to follow. What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies. It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.

[16] The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering In. GL.EN SpA* [2003] UKHL 17; [2003] 2 All ER 615; [2003] 2 AC 541 at [9] (Lord Bingham), 51 (Lord Walker).

[36] However, Lord Sumption's clean break approach was not shared by

Lord Briggs who said as follows:

> 25. I must start by explaining why I have not been persuaded by Lord Sumption's analysis that I can surmount the conceptual problem that has thus far proved insuperable in most common law jurisdictions, as enunciated in the celebrated dictum of Cardozo J in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 which Lord Sumption cites at para 7. His starting point is that to refuse to recognise the effect of a NOM clause is to override the parties' intentions, so as to make it impossible for them validly to bind themselves as to the manner in which a change in their legal relations is to be achieved in the future. I respectfully disagree. For as long as either (or any) party to a contract containing a NOM clause wishes the NOM clause to remain in force, that party may so insist, and nothing less than a written variation of the substance will suffice to vary the rest of the contract (leaving aside estoppel). The NOM clause will remain in force until they both (or all) agree to do away with it. In particular it will deprive any oral terms for a variation of the substance of their obligations of any immediately binding force, unless and until they are reduced to writing, or the NOM clause is itself removed or suspended by agreement. That fully reflects the autonomy of parties to bind themselves as to their future conduct, while preserving their autonomy to agree to release themselves from that inhibition.
>
> 30. Necessity is in this context a strict test. It will, perhaps unfortunately, commonly be the case that the persons charged with the day to day performance of a business contract will, with full authority to do so, agree some variation in the manner in which it is to be performed, blissfully unaware that the governing contract has, buried away in the small print of standard terms, a NOM clause inserted by diligent lawyers anxious to minimise the risk of litigation about its terms. That will be arid ground for an implied term that the NOM clause, of which they were unaware, was agreed to be treated as done away with. Where however the orally agreed variation called for immediately different performance from that originally contracted for, before any written record of the variation could be made and signed, then necessity may lead to the implication of an agreed departure from the NOM clause, but the same facts would be equally likely to give rise to an estoppel, even if not. But that is far from the facts of this case, where there was no such urgency.
>
> 31. In my view this more cautious recognition of the effect of a NOM clause, namely that it continues to bind until the parties have expressly (or by strictly necessary implication) agreed to do away with it, would give the parties most of the commercial benefits of certainty and the avoidance of abusive litigation about alleged oral variation for which its proponents contend. It would certainly do so in the present case. It would probably leave only those cases where the subject matter of the variation was to be, and was, immediately implemented, where estoppel and release of the NOM clause by necessary implication are likely to go hand in hand. While it might in theory also leave open the case where it is alleged that the parties did have the NOM clause in mind, and then agreed to do away with it orally, that seems to me to be so unlikely a story that a judge would usually have little difficulty in treating it as incredible (if denied), and therefore as presenting no obstacle to summary judgment on the contract in its unvaried form.
>
> 32. In proposing this perhaps cautious solution to the problem thrown up by this

A case I am comforted by the perception that it represents an incremental development of the common law which accords more closely with the conceptual analysis adopted in most other common law jurisdictions, as Lord Sumption has described. By contrast the more radical solution which he proposes would involve a clean break with something approaching an international common law consensus, B unsupported by any societal or other considerations peculiar to England and Wales. There may be cases where a pressing need to modernise the common law justifies such a break, perhaps in the expectation that other common law jurisdictions will in due course follow, but this case is not, in my opinion, one of them.

C **[37]** I am more inclined to adopt the position taken by Lord Briggs. Quite apart from the reasons stated in his judgment, I would humbly add the following:

(a) in most instances where such an anti-oral variation clause is included in D the contract, the same is not specifically instructed by the contracting parties but as held by Lord Briggs, is 'inserted by diligent lawyers anxious to minimise the risks of litigations of its terms'. I think a distinction ought to be made between cases where an anti-oral variation clause is expressly posited during negotiation bt the parties and cases where such E a clause was merely inserted without the parties' instruction by counsel into the agreement. Where the contracting parties did not consciously indicate their desire to include such a term, in my mind, the court should more readily imply that by the parties' oral agreement to vary, the anti-oral variation clause is to be treated as done away with. F Lord Sumption held that 'the natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it'. I would suggest that the reason the parties overlooked it is because they had never negotiated for it which explains why they are unaware of it when G they agreed to orally vary the contract. Hence to say that the parties 'were courting invalidity with their eyes open' is, with respect, may not be the case at all;

(b) whilst the three reasons given by Lord Sumption are all legitimate H commercial reasons for upholding an anti-oral variation clause, is it also not in the interest of businessmen to expect the courts to uphold an agreement mutually agreed upon by them (albeit orally) notwithstanding the terms of the original contract? Should a party be permitted to renege from his agreement based on a clause which the parties were probably not I aware of at the time of the oral agreement and which in all probability, if the said clause were to be brought to their attention at the time of the oral agreement, the parties would have readily state that the formality is to be waived or that would have agreed to reduce their oral agreement into writing to make sure that their oral agreement is given effect to? and

(c) whilst certainty and expediency are important consideration, it should not prevail over the principle of party autonomy. Cardozo J put it mostly succinctly when he said 'Those who make the contract, can unmake it'.

[38] I am aware that my brother Justice Mohd Nazlan Mohd Ghazali has in his judgment in *HTJ Development Sdn Bhd v Teoh Chin Kee & Anor* [2018] MLJU 1753; [2018] 1 LNS 1849 referred to *MWB Business Exchange Centres Ltd*. However, in that case the learned judge had referred to Lord Sumption's judgment in respect of the application of the doctrine of estoppel in the face of an entire agreement clause. He found as a matter of fact in that case that there was no unequivocal representation that any alleged variation was valid.

[39] Reference was also made in the judgment of *HTJ Development Sdn Bhd* to the High Court decision of *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11 which ruling was applied by the Court of Appeal in *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor* [2013] 8 MLJ 713; [2015] 2 CLJ 530 and *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585.

[40] Upon close perusal of Abdul Aziz Mohamad J's (as he then was) judgment in *Macronet Sdn Bhd*, it is immediately apparent that His Lordship was not dealing with an anti-oral variation clause at all but an entire agreement clause. Significantly, the case was about the parol evidence rule under s 92 of the Evidence Act 1959, dealing with pre-contractual negotiations and whether there was in existence a collateral contract existing side by side with the main agreement. This is also the issue before the Court of Appeal in *Master Strike Sdn Bhd*.

[41] Accordingly, I hold that the parties in the present case can validly vary their agreement orally notwithstanding the existence of cl 12.8 of the agreement.

[42] In any case, I hold that the respondents are estopped from insisting on compliance with the anti-oral variation clause given my finding that there was indeed an unequivocal decision made by the C-Suite Committee to have the TMA trademarks' to be assigned to DMSB without the need to assign the same thereafter to the first respondent. The appellant had clearly relied on the decision and representation and had not taken any further action after the filing of the trademarks on 17 July 2017. The respondents had further represented to the appellant that all the condition precedents have been complied with and did not raise this as an issue during the condition period and thereafter. This amounts to an unequivocal representation to the appellant that the variation is valid. In fact, the only concern expressed by the respondents was the under performance of the appellant's business.

[43] It must be understood that when the decision was made by the C-Suite Committee to vary and waive the need to assign the TMA trademarks to the first respondent, the circumstances then were that the first respondent's personnel had already taken over the management of DMSB (and the operations of 'The Morning After') with the appellant re-designated as the Brand CEO — Western Division of the second respondent. The first respondent in particular, had also begun enjoying the economic benefits by including 'The Morning After' in its company profile and marketing as one of the restaurants and cafes under the respondents' stable. During the period when the trademark assignment process was on-going, the appellant had already fully immersed himself in the overall operations of the second respondent. He was only in name, a shareholder and director pending the completion of the acquisition of DMSB's shares by the second respondent.

[44] The assignment of the TMA trademarks was in the respondents' full directional control namely through the respondents group legal counsel, Lai Chee Hoe (DW3) who was at all material times tasked with attending to the assignment of DMSB's TMA trademarks. Lai Chee Hoe in turn instructed Foong Cheng Leong, a trademark lawyer to carry out the trademarks' assignment process. DW3 testified that he was given instruction to assign the trademarks to DMSB, contrary to cl 5.1.1(a) SSA.

[45] Tham Lih Chung (DW1), Andre Shum (DW2) and Lai Chee Hoe (DW3) all testified that they were instructed to ensure that the two TMA trademarks in question were assigned to DMSB only. It was the respondents' own decision (corroborated by its own key executives) that there has been no breach of cl 5.1.1(a). This is consistent with the fact that for over 12 months (2017–2018), the respondents had control of DMSB and not once did the respondents issue any correspondence or evidence alerting the appellant or even offering the appellant an opportunity to correct the alleged failure in transferring the trademarks.

[46] In a case such as here, it would be unjust and detrimental to the appellant if the respondents are permitted to rely on cl 12.8 of the agreement. Learned counsel for respondent belatedly filed a further submission alluding to the fact that estoppel was never pleaded in the appellant's defence. In this case, the anti-oral variation clause was only raised by the respondent in submission after trial. The question of the circumstances in which the representation giving rise to estoppel was therefore not examined in evidence. It would therefore be unjust if the appellant is now barred from raising estoppel. I would follow the reasonings by His Lordship Abdul Aziz Mohamad JCA in *Goh Eng Hwa v M/S Laksamana Realty Sdn Bhd* [2004] 3 MLJ 97; [2004] 1 CLJ 274 and hold that the respondent is precluded from raising this pleading point for the same reasons.

[47] Accordingly, I hold that the learned sessions court judge was wrong when she held that the appellant was prohibited from raising the existence of a variation to the cl 5.1.1(a) and I further hold that on the proper consideration of the evidence that had been adduced at the trial before her, the appellant had indeed discharged his legal obligation of proving on a balance of probability that the respondents had agreed to vary the cl 5.1.1(a) of the agreement such that the respondents had agreed to the appellant assigning the TMA trademarks to DMSB without the need to have the same assigned to the first respondent. The respondents are also estopped from relying on cl 12.8 of the agreement.

[48] Therefore, I agree with the learned counsel for the appellant that had the learned sessions court judge considered the evidence adduced before her as enumerated above, the finding must be that the appellant had not breached the condition precedent under cl 5.1.1(a) of the agreement.

[49] The next issue for consideration in this appeal is whether there was a misrepresentation by the appellant of the financial position of DMSB.

[50] According to the respondents, in the email dated 22 September 2016 that enclosed the outlet P&L of DMSB for the period from January–August 2016 submitted by the appellant, there was a misrepresentation as regards the profit of DMSB. The outlet P&L had stated a profit of RM128,387.20. This, according to the respondent was a misrepresentation as the audited account of DMSB that was subsequently furnished to the respondent in October 2017 shows a loss of RM935,509 for the period from January 2016–March 2017 ('the audited account').

[51] In fact, based on a month-to-month analysis for the period from January–August 2016 between the outlet P&L and the audited account, the respondents submitted that the actual position of DMSB for the same period in fact registered a loss of RM168,149.66 which means that the appellant had overstated the profit by RM296,536.86.

[52] The learned sessions court judge found that the outlet P&L did indeed contain inaccurate information which was relied upon by the respondents when a representation was made to its board of directors which subsequently approved the purchase of the appellant's shares in DMSB. The learned sessions court judge found that the appellant had given the respondents the impression that DMSB was a profitable company when in fact it was a loss-making entity. This is in breach of the warranties under cl 7 of the agreement which require the appellant to provide true, complete and accurate in all respect information to the respondents.

[53] What is patently clear from the judgment of the learned session court judge is the absence of any due consideration to the reasons or objectives of the respondents' decision to purchase the appellant's shares in DMSB. This has a bearing on whether the stated profit of RM128,387.20 in the outlet P&L was in fact relied upon by the respondents in their decision to purchase the DMSB shares. There is also insufficient weight given to the meeting by the respondents' Board of Directors ('BOD') considering the purchase of the appellant's shares in DMSB.

[54] The respondents' BOD had on 20 November 2016 met to deliberate on whether to approve the purchase of the appellant's shares. Agenda 9 of the meeting was 'To approve proposed acquisition of 'The Morning After'.

[55] The financial information that was placed before the BOD marked as '06' is set out below:

	FYE 2014	FYE 2015	Jan 16-Aug 16	Annualised 2016	Projection **
Sales	1,520,456	2,463,283	1,823,555	2,735,332	3,444,932
COGS	533,327	824,008	587,311	880,966	1,145,256
Gross Profit	987,129	1,639,275	1,236,244	1,854,366	2,410,676
Other Income	—	405,433	—	—	—
Operation Expenses	1,079,773	1,936,241	704,583*	1,056,874	1,373,937
EBITDA	(92,644)	108,467	531,661	797,492	1,036,739
EBITDA Multiple	—	—	—	—	4
Valuation	—	—	—	—	4,146,956

[56] There is no dispute that the above was the financial information relied on by the BOD in their decision to invest in DMSB. What is immediately obvious from the financial information presented before the BOD is that the profit of RM128,387.20 was not even presented to or considered by the BOD. Instead, the BOD was only interested in the EBITDA figure which is the earnings before interest, taxes, depreciation and amortisation. This is a common formula used for measuring a company's operating performance and profitability. PW3 who was the Chief Corporate Officer of the second respondent in fact confirmed that the BOD will look at EBITDA before they start to acquire and that the figure RM128,387.20 was never presented. This was what he said:

> HRD: In your board meeting, did you ask your CFO whether depreciation or amortization cost all included in this financial representation? Did you ask him?

PW-3: For your information,

HRD: My question is simple, did you ask him?

PW-3: No.

HRD: Why did you not ask him?

PW-3: Because we look at EBiTDA.

HRD: So basically you are now confirming that this 128,387.20 is an EBITDA figure, correct?

PW-3: I cannot confirm that because it was never presented. When you receive this document, there is no depreciation, so, I will not be able to confirm whether there's depreciation or not.

HRD: I know, that's why I', trying to ask, I want to see what was your state of mind, the board's state of mind when they accepted this figure? So you're saying earlier that the board will look at EBITDA figures before they starting to acquire correct?

PW-3: Yes.

[57] Accordingly, only the total net sales (RM1,823,555), the total cost of good sales (RM587,311), the gross profit (RM1,236,244) and the operation expenses (RM704,583) from the outlet P&L were plucked out and used for the financial presentation to the BOD for its consideration whether to approve the purchase of the appellant's shares.

[58] The aforesaid figures were used to arrive at the EBITDA of RM531,661 which was thereafter annualised to RM796,492. This annualised figure was given a projection of a 30% growth to arrive at a figure of RM1,036,739 as the applicable EBITDA. A multiple of four was used to arrive at a valuation of RM4,146,956 for the BOD's consideration.

[59] There is no evidence that the projection of 30% growth of the EBITDA was a representation by the appellant. Equally, the multiple of four to the EBITDA as the valuation of DMSB was also not from the appellant.

[60] Based on the aforesaid, it is difficult to appreciate how the respondents can say that they were misled by the profit figure of RM128,387.20 stated in the outlet P&L in arriving at their decision to purchase the appellant's shares. The respondents' BOD was never presented with the figure, let alone relied on it when approving the purchase. In fact, in the minutes of the seventh BOD Meeting marked as 07, in respect of Agenda 9, it is recorded that:

AGENDA 9: PROPOSED ACQUISITION OF 'THE MORNING AFTER'

The Board of Directors unanimously approved on the acquisition of 80% of The

Morning After based on valuation of RM4,000,000 via a combination of share swaps and cash.

[61] Both the slides and the minutes of the BOD meeting directly contradict PW3's evidence that the outlet P&L was presented to the BOD and that it was the sole reason for the BOD's decision to acquire the appellant's shares. This was what PW3 said:

HRD: So, Mr Clement, your testimony that this figure of 128,387.20 was presented at the board?

PW-3: Yes

HRD: And you are saying based on these figures 128,387.20 the board then a decision to acquire shares in Delicious Moments, take over the business 'The Morning After'?

PW-3: Yes.

[62] The clear contradiction of PW3's oral testimony with the documentary evidence (D6 and D7) in my mind significantly undermine PW3's credibility as a witness and this was not considered at all by the learned sessions court judge. Interestingly, the slides containing the presentation to the BOD (D6) was not produced by any of the respondents' witnesses including PW3 who had prepared the slides.

[63] On the other hand, what transpired during the BOD meeting is corroborated by the testimony of DW1 who was the then CEO presenting the financial figures to the BOD on 20 November 2016. This is what DW1 said:

HRD: So the Board decided to proceed with the acquisition based on a valuation of RM 4 million. Is that correct?

SD1: That's correct.

HRD: So the Board didn't agree to proceed with the acquisition because there was a net profit of RM 128,000?

LA: Objection, sekali lagi Puan, leading.

HRD: Ok. Was this figure deliberated by the Board.

S1: The figures deliberated by the Board is based on what was present on the Board paper.

[64] According to PW1, the second respondent had only 'discovered' that there was a financial misrepresentation when they received DMSB's audited accounts sometime in October 2017. He said that upon discovering the same, the respondents tabled it to the BOD and the BOD decided that 'because of this financial misrepresentation, we will not go through, will not complete the

deal and to terminate. And they asked me to go and talk to the defendant'. A

[65] Yet, the respondents did not adduce before the trial the minutes of the said BOD where the financial misrepresentation was purportedly tabled for consideration. Neither was there any evidence that PW1 had thereafter informed or spoke to the appellant of the financial misrepresentation. It is also telling that when PW3 was asked whether at a meeting in November 2017, the alleged financial misrepresentation was told to the appellant, he could only say that he 'cannot recall'. B

C

[66] An important feature of the agreement is that upon the execution of the same, the respondents would immediately or soon thereafter assume responsibility for the financial services of DMSB. This is not in dispute and admitted by PW2. DW2 also confirmed when he said the following:

D

> HRD: But subsequently, Mr Andre, as a director of Rhombus Food & Lifestyle, did RFL take over operations of The Morning After?
>
> DW-2: At that time, yes. The Morning After was part of Rhombus, we have already taken over the operations and definitely, we have taken over their finance as well.
>
> DW-2: Rhombus Food & Lifestyle. And all the finances were handed by our Finance Team already. And we do have also operations meeting together as well. E

As such, the respondents had access to the financial performance of DMSB by end 2016 or latest early 2017. It would not have escaped the respondents' attention by early to mid-2017 that DMSB was underperforming financially. Yet, there was never any queries raised to the appellant on his outlet P&L throughout 2017 at all. In fact, in the agreement, what was referred to was not the outlet P&L but the latest management accounts of DMSB with the closing date as at 31 October 2016. This was not even requested for by the respondents. From the evidence, it can be inferred that the reason why the respondents were not anxious of the profit of RM128,387.29 stated in the outlet P&L or the losses during the period when the respondents took over 'The Morning After' business was because the respondents was measuring its performance based on its EBITDA. There is also another reason. This has to do with the reason for the respondents' interest in acquiring DMSB. F G H

[67] No consideration was given or insufficient weight was given by the learned sessions court judge to the testimony of DW1 on the respondents' reason or objective of acquiring the appellant's business. In 2016, the respondents were on an expansion mode through merger and acquisition. This was how DW1 described it: I

> HRD: Ok. Now, when you were the CEO and I'm going to confine it to the period

of, let say August 2016 onwards, what were some of your responsibilities as CEO? In summary, could you describe it?

DW-1: Ok. Because Rhombus Connexion it was on the expansion mode through merger and acquisition, my main right is to —

HRD: Maybe you speak a little slower so that we can capture and also for Pn J to get it down.

DW-1: Ok. Rhombus Connexion expansion mode is through merger and acquisition. So my main role is to chart the blueprint for the Group.

DW-1: Chart. The business plan, the business model for the Group and also to identify potential targets to be acquired as well because nthat is the direction of the Group back then.

HRD: What was the ultimatum, objective of your exercise? Was it for more business profit?

DW-1: Ok. All these exercised are meant to grow the business of the Group including the revenue and also the profitability with the aim of going for listing or a trade sale to be disposed of to another company. That is the intention.

[68] The respondent found the appellant's business to be a good fit because they had wanted a coffee brand and they viewed the coffee business as easier to develop and more scalable. This evidence from DW1 is not disputed. He expressed it as follows:

DW-1: We also look at whether the potential targets fit into our Group portfolio because we wanted a coffee brand. We wanted a brand which is scalable and then we can franchise or license in the future. So we also taking into consideration of the targets that we acquiring and which segments they're involved in and coffee segment is one of our targets.

DW-1: Scalable it means that the brand of even can scale it to maybe 50 outlets or 100 outlets and potentially maybe even 1000 outlets. Not only in Malaysia but also outside of Malaysia as well.

[69] DW1's testimony was also confirmed by DW2. This was what he said:

HRD: You did not. What do you know about The Morning After?

DW-2: It's a coffee brand. At that time, we were looking for another scalable platform and coffee was the choice of what we wanted then. And it was a good brand and it's been around for a while and it has several outlets I believe at that time, many outlets and we saw it as something we could scale.

[70] The aforesaid explained the conduct of the respondents who were not too bothered by DMSB's poor financial performance in 2017 and also their failure to even seek from the appellant the management account for the financial period as at 31 October 2016 stated in the agreement.

[71] In fact, by their own admission, even after receiving from the appellant the audited accounts in October 2017, they took no steps to determine what were the financial inaccuracies in comparison with the outlet P&L until after this suit has been commenced when PW2, the first respondent's finance manager, was instructed to come up with the comparison. This was what he said:

> PW2 : This one is after, we, this table we prepared after we aware of the other case.
>
> HRD : So your testimony is that, you prepared this document in June or July 2018, correct? Earlier you mentioned.
>
> PW2: Ya.
>
> HRD: So I'm trying to understand, what this case is about, Mr Khoo. In January, the 2nd Plaintiff, or the Plaintiffs took the decision to terminate the share sale agreement and yet only in July, 6 months later, you produce the document at page 361, trying to justify the financial misrepresentations, correct?
>
> PW2 : This schedule is prepared by me, after I'm aware about the case.

[72] The aforesaid admission is clear evidence that the respondents' claim of financial misrepresentation against the appellant is in truth an afterthought, contrived to support their claim for a breach of warranty under the agreement. The sessions court judge erred in failing to take into account that the respondents' office holders were all seasoned F&B professionals, having operated and managed numerous restaurants. They were also all highly qualified in finance and accounting.

[73] The truth as revealed in the evidence was that the respondents were anxious to quickly complete the acquisition as part of its expansion strategy. This is evidenced from the following change in the structure of the group after the execution of the agreement:

(a) almost immediately after the agreement, the respondents took over the financial management of DMSB including making themselves joint signatories to its banking accounts. The appellant no longer had authority in terms of finance and had to take instructions from the BOD;

(b) the human resource functions of DMSB was also surrendered to the respondents;

(c) the appellant was appointed to its management team as its brand CEO (Western Division) to look after the group venture in the western food space and was to report to the persons designated in the group corporate structure. This included The Morning After;

(d) The Morning After business was immediately treated as part of the business of the group featuring in their restaurants and cafes profile; and

(e) the appellant was made a member of the C-Suites Committee within the group.

[74] However, a year later, it seems that the respondents only became concerned about some of their acquisitions that were underperforming. Three outlets were identified, namely, Madam Lim, The Morning After and Fresh Freddies. This led to a proposal to dispose off loss-making outlets to cut losses. This is evidenced from the minutes of the second respondent's second annual general meeting on 10 December 2017 which states:

> Mr Brian Cheong then raised a question on the proposed disposal of outlets such as Madam Lim, The Morning After and Fresh Freddies which he recalled were only acquired in the year before and the impact of the potential impairment charges on the Net Assets of the Company in the current year. In this regard, Mr Kent Chua explained that the Board made a business judgment to dispose all loss-making outlets as a strategic move to cut losses.

[75] DW2's testimony also corroborated the evidence that the respondents had wanted to divest The Morning After brand due to its non-performance with no mention of any financial misrepresentation. This was what he said:

> DW-2: At that time, it was mentioned that we wanted to divest brands that were not performing.
>
> HRD: Anything else that was mentioned in regards to these brands? Any reasons given for divesting these brands, apart from non-performing?
>
> DW-2: No.

[76] Clearly, the termination of the agreement by the first respondent was made as part of the decision taken to cut losses. It was never based on any financial misrepresentation or non-compliance of any condition precedents as the respondents are now contending. It was a 'business judgment' and 'a strategic move to cut losses'. There was no mention of any financial misrepresentation which is completely a different reason from the decision based on 'business judgment'.

[77] In *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460, Justice Gopal Sri Ram JCA (as he then was) set out the necessary prerequisites of an actionable misrepresentation as follows:

> Now the elements of an actionable misrepresentation are well settled. They are set out as follows in *Professor's Mckendrik's Contract Law* (3rd Ed), a leading work on the subject:
>
> > A misrepresentation may be defined as an unambiguous, false statement of fact which is addressed to the party misled and which materially induces the contract. This definition may be broken down into three distinct elements. The first is that

A

> the representation must be unambiguous false statement of fact, the second is that it must be addressed to a party misled and third that it must be material inducement to entry into the contract.

B

[78] As the respondents' BOD was never presented with the profit figure of RM128,387.20 and the BOD had not relied on the same and was not induced thereby into entering the agreement with the appellant, the respondents had not established on the balance of probabilities their case for misrepresentation.

C

[79] I find that there was no breach of any warranties by the appellant in the form of a financial misrepresentation as claimed by the respondents. The profit figure of RM128,387.20 in the outlet P&L which the respondents claimed was overstated was never presented and relied upon by the respondents' BOD when approving the purchase of the appellant's shares.

D

[80] The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 laid down the gold standard of the 'plainly wrong' test why an appellate court should intervene to reverse finding by the trial court and it is thus:

E

> It is settled law that an appellate court will not generally speaking intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.

F

[81] With respect to the learned sessions court judge, this is a case where she was plainly wrong.

[82] Given that there was no breach, the termination of the agreement by the respondents under the letter dated 16 January 2018 was unlawful.

G

[83] The remaining issue is whether the appellant is entitled to keep the RM600,000 that was paid under the agreement as non-refundable earnest deposit. The evidence is clear that the parties had intentionally agreed to vary the purchase consideration from 'cash consideration' to 'non-refundable earnest deposit'. I agreed with learned counsel for the appellant that the RM600,000 was a security to the appellant as the respondents wanted operational control immediately and he had to give up operational control of DMSB as well.

H

I

[84] It is trite that a party is entitled to keep the deposit paid as security if there was a failure to fulfil the contract by the purchaser. This Federal Court in *Karuppiah v Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 173 made this clear in the following passage in its judgment:

As regards s 65, it is said that, if the company has the option to rescind this contract, then as the $4,000 deposit received by it is a benefit received from the plaintiff, the company must under s 65 restore that benefit to the plaintiff. The 1957 edition of *Pollock and Mulla* on the Indian Contract Act says this (at p 386) about the effect of the corresponding Indian section on earnest money:

> The Act requires that a party must give back whatever he received under the contract. The benefit, however, to be restored must be benefit received under the contract. A agrees to sell land to B for Rs 40,000. B pays to A Rs 4,000 as a deposit at the time of the contract, the amount to be forfeited to A if B does not complete the sale within a specified period. B fails to complete the sale within the specified period, nor is he ready and willing to complete the sale within a reasonable time after the expiry of that period. A is entitled to rescind the contract and to retain the deposit. The deposit is not a benefit received under the contract; it is a security that the purchaser would fulfil his contract, and is ancillary to the contract for the sale of the land.

The 1965 edition of *Sanjiva Row* on the Indian Contract Act is to the same effect. It says at p 1196:

> A deposit for sale is not a benefit under the contract. It is a security that the purchaser would fulfil his contract and is ancillary to the contract of the sale of property. Therefore where the purchaser does not complete the sale within the specified time, nor is he ready to complete it within a reasonable time after the expiry of that period, the seller may rescind the contract and retain the profit.

CONCLUSION

[85] In the premises, I allow the appellant's appeal with costs.

Appeal allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh